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December 27, 2011

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

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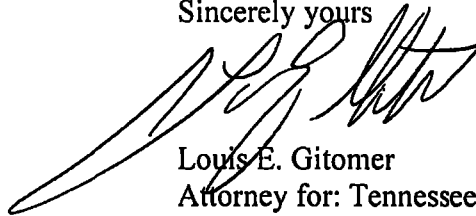
RE: Finance Docket No. 35449, *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Corporate Family Exemption—Sacramento Valley Railroad, LLC and Piedmont & Northern Railway, LLC*

Dear Ms. Brown:

Enclosed for filing are the original and 10 copies of the Response to Sierra Northern Railway.

Thank you for your assistance. If you have any questions, please call or email me.

Sincerely yours



Louis E. Gitomer  
Attorney for: Tennessee Southern Railroad  
Company, Patriot Rail, LLC, Patriot Rail Holdings  
LLC, and Patriot Rail Corp., and Sacramento Valley  
Railroad, LLC

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Public Record

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35449

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TENNESSEE SOUTHERN RAILROAD COMPANY, PATRIOT RAIL, LLC,  
PATRIOT RAIL HOLDINGS LLC, AND PATRIOT RAIL CORP.  
—CORPORATE FAMILY EXEMPTION—  
SACRAMENTO VALLEY RAILROAD, LLC AND PIEDMONT & NORTHERN RAILWAY,  
LLC

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RESPONSE TO SIERRA NORTHERN RAILWAY'S PETITION TO NULLIFY THE  
EXEMPTION

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RAILROAD COMPANY, PATRIOT RAIL, LLC,  
PATRIOT RAIL HOLDINGS LLC, PATRIOT  
RAIL CORP., and SACRAMENTO VALLEY  
RAILROAD LLC

Dated: December 27, 2011

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RESPONSE TO SIERRA NORTHERN RAILWAY'S PETITION TO NULLIFY THE  
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Patriot Rail, LLC ("PRL"), Patriot Rail Holdings LLC ("PRH"), Patriot Rail Corp. ("Patriot"), Tennessee Southern Railroad Company ("TSRR"), and the Sacramento Valley Railroad, LLC ("SAV," together with PRL, PRH, Patriot, and TSRR are referred to as "Respondents") respond in opposition to the Petition to Nullify the Exemption (the "Petition") filed on December 7, 2011 by Sierra Northern Railway ("Sierra").

Respondents are unfamiliar with a "Petition to Nullify the Exemption." Respondents will address the Petition as a request to revoke the exemption because (1) the "notice of exemption contains false or misleading information which is brought to the Board's attention (49 §C.F.R. 1180.4)(g)(1)(ii));" or (2) "application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title" (49 U.S.C. §10502(d)). Respondents will demonstrate that Sierra has not shown the presence of false or misleading information or the need for regulation under 49 U.S.C. §10101. Mr. Marks' attached Verified Statement demonstrates that nine railroad subsidiaries of PRL were reorganized as limited liability companies to be able to obtain tax benefits and not for

any other purpose. Since Sierra has not met either criterion to revoke the exemption, Respondents respectfully request the Board to deny the Petition expeditiously.<sup>1</sup>

### **BACKGROUND**

After it was closed, the McClellan Air Force Base was acquired by Sacramento County ("Sacramento"). In turn, Sacramento contracted with McClellan Business Park, LLC ("McClellan") to develop and operate the newly renamed McClellan Business Park ("MBP") as a rail-served industrial park.<sup>2</sup> McClellan hired the Yolo Shortline Railroad Company ("Yolo") to provide rail service in MBP.<sup>3</sup> Sierra Railroad Company ("SRC"), predecessor in interest to Sierra, acquired control of Yolo.<sup>4</sup>

In 2007, PRL and Sierra began negotiations for PRL to acquire Sierra. Negotiations progressed to the point where PRL was comfortable seeking Board authority to control a

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<sup>1</sup> Respondents note that 49 U.S.C. §10502(d) provides that "The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding." As Respondents demonstrate, there is no need to begin a proceeding. Respondents urge the Board to deny the Petition by March 6, 2012, 90 days after the Petition was filed.

<sup>2</sup> Neither Sacramento nor McClellan has ever held themselves out to provide rail service, nor has either applied to the Board to become rail carriers. A review of the Railroad Retirement Board (the "RRB") coverage decisions indicates that the RRB does not consider Sacramento or McClellan a rail carrier for the RRB's purposes. Since SAV has operated in the MBP, neither Sacramento nor McClellan have exerted or attempted to exert any type of operational control over how SAV performs its common carrier service.

<sup>3</sup> Yolo acquired an exclusive occupancy and operating rights over seven miles of unmarked railroad track in MBP. *Yolo Shortline Railroad Company--Acquisition and Operation Exemption--County of Sacramento, CA*, Finance Docket No. 34018 (STB served March 27, 2001).

<sup>4</sup> *Sierra Railroad Company--Acquisition of Control Exemption--Yolo Shortline Railroad Company*, Finance Docket No. 34351 (STB served June 11, 2003). SRC was then merged into Yolo. *Sierra Railroad Company--Corporate Family Transaction Exemption--Yolo Shortline Railroad Company*, Finance Docket No. 34360 (STB served June 23, 2003).

subsidiary that was acquiring the assets of Sierra Northern Railway and Sierra Railroad Company.<sup>5</sup> However, a final agreement was never reached and the transaction was not closed.

Prior to PRL seeking authority to acquire Sierra, McClellan sought bids for the continued rail operation in MBP. PRL bid on the project and was awarded the right to provide rail service in MBP. Thereafter, PRL had SAV incorporated to be the entity to provide the rail operations. SAV sought and obtained Board authority and PRL obtained authority to continue-in-control of SAV upon SAV becoming a rail carrier.<sup>6</sup> No opposition to these proceedings was filed with the Board by any party, including Sierra, prior to consummation. Indeed, no opposition has been filed until the Petition was filed.

Late in 2010, PRL recognized that its railroad subsidiaries could obtain tax benefits by selling certain tax credits if it reorganized some, but not all, of the railroads from corporations into limited liability companies. As is evidenced by the attached Verified Statement from Bennett Marks, the Executive Vice President and Chief Financial Officer of PRL, SAV and the Piedmont & Northern Railway, LLC were reorganized from corporations into limited liability companies. *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Corporate Family Transaction Exemption—Sacramento Valley Railroad, LLC and Piedmont & Northern Railway, LLC*, Finance Docket No. 35449 (STB served December 8, 2010) (the “December 2010 Notice”). Nearly contemporaneously, PRL acquired

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<sup>5</sup> *Sierra & Central Pacific Railroad Company, Inc.—Acquisition and Operation Exemption—Sierra Northern Railway and Sierra Railroad Company*, Finance Docket No. 35165 (STB served August 1, 2008); and *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Sierra & Central Pacific Railroad Company, Inc.*, Finance Docket No. 35166 (STB served August 1, 2008).

<sup>6</sup> *Sacramento Valley Railroad, Inc.—Operation Exemption—McClellan Business Park LLC*, Finance Docket No. 35117 (STB served February 14, 2008); and *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Sacramento Valley Railroad, Inc.*, Finance Docket No. 35118 (STB served February 14, 2008).

the assets of six railroads that had been corporations under Weyerhaeuser, and set them up as limited liability companies. See *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Columbia & Cowlitz Railway, LLC, DeQueen and Eastern Railroad, LLC, Golden Triangle Railroad, LLC, Mississippi & Skuna Valley Railroad, LLC, Patriot Woods Railroad, LLC, and Texas, Oklahoma & Eastern Railroad, LLC*, Finance Docket No. 35425 (STB served November 12, 2010). In 2011, Patriot changed two entities to limited liability companies - Patriot Rarus Acquisition, LLC and Rarus Railway, LLC. The reorganization of these nine railroads as limited liability companies, instead of as corporations resulted in significant financial benefit to PRL and its railroad subsidiaries, just as the parties claimed was the purpose of the transaction in the Notice of Exemption in Finance Docket No. 35449 that was filed on November 22, 2010 (the “*November Notice*”). In responding to the request for information concerning the purpose of the transaction, the parties stated “The proposed transaction will allow PRL and the corporate family to make use of certain tax benefits as a result of the restructuring, without affecting operations or service.” *November Notice* at 5. It must be emphasized that Sierra did not file anything in response at the time the *November Notice* was filed. Sierra and PRL were engaged in the same litigation in California at the time of the *November Notice*, and the issues were the same. Respondents contend that Sierra’s failure to act at the time that the transaction was proposed before the Board is clear evidence that the Petition is at best baseless and at worst frivolous and malicious.<sup>7</sup>

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<sup>7</sup> It should be noted that the verification included with the Petition is of little value since the Petition attributes certain incorrect rationales to Respondents’ actions based solely upon Sierra’s apparent litigation strategy. Mr. Magaw is not in a position to know what Respondents were thinking and why Respondents took certain actions.

## ARGUMENT

Sierra seeks to have the Board revoke the *December 2010 Notice*. In order to prevail, Sierra must prove that (1) the “notice of exemption contains false or misleading information which is brought to the Board’s attention (49 C.F.R. §1180.4)(g)(1)(ii);” or (2) “application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title” (49 U.S.C. §10502(d)). Sierra has not shown that the *November Notice* contained or omitted false and misleading information, and has not even tried to show that the transportation policy requires regulation of the transaction proposed in the *November Notice*.

### **The *November Notice* does not contain false and misleading information.**

Sierra argues that the *November Notice* should have advised the Board that restructuring SAV from a corporation to a limited liability company would have made it more difficult for Sierra to collect a speculative judgment if it succeeded at trial. Sierra is wrong. That was not the purpose of restructuring SAV, or the other PRL railroads.

Sierra conveniently fails to advise the Board that SAV is not a defendant in the law suit, but that PRL is the defendant. If Sierra was to prevail, and it is PRL’s strongly held conviction that Sierra will not prevail and will not be awarded any judgment, the judgment would be against PRL. Therefore, the structure of SAV is not relevant, except as an asset of PRL.<sup>8</sup>

The Board’s rules required the *November Notice* to discuss “The purpose sought to be accomplished by the proposed transaction.” 49 C.F.R. §1180.6(a)(1)(iii). The purpose provided in the *November Notice* was to make use of certain tax benefits. Respondents made use of those tax benefits as stated by Mr. Marks.

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<sup>8</sup> As an asset of PRL, SAV and the rest of the railroad subsidiaries have been financially strengthened by their ability to sell tax credits.

Sierra contends that the purpose of the *November Notice* was to make it more difficult for the Court to order SAV's interest in a contract for SAV to operate in the MBP between SAV and McClellan to be assigned to Sierra. Sierra goes on to argue that because Respondents did not advise the Board that this was the true purpose of the *November Notice* that the *November Notice* contained false and misleading information and the authority should be revoked. Respondents' purpose in filing the *November Notice* was to obtain tax benefits, not to shield assets of SAV from at best a speculative judgment in favor of Sierra. Sierra's claim is no more substantial than a child's sand castle on the beach in the face of a hurricane.

In order for Respondents to determine that protecting the assets of SAV from judgment was the purpose of the *November Notice*, Respondents would have had to make certain highly unlikely assumptions, based on nothing more than Sierra's baseless hopes. First, Respondents would have had to assume that Sierra will win its counter claim. Sierra will not prevail. Next, Respondents would have to conclude that the Court would interfere with a contract between SAV and McClellan that was awarded to PRL after a fair and open bidding process. Respondents are confident that Sierra will not be able to persuade the Court to interfere with the contract. Finally, if Respondents concluded that there was any realistic probability of the prior assumptions being true, which Respondents do not, the Respondents would have to assume that restructuring SAV as a limited liability company would prevent a Federal Judge from issuing an appropriate order and enforcing that order. Respondents never considered these assumptions because they are fabrications from the imagination of Sierra, and more importantly, the reason for the *November Notice* was tax benefits. The assumptions necessary to reach Sierra's conclusion are ridiculous.



Sierra has not presented any evidence that the purpose of the *November Notice* was anything other than tax benefits and has not justified revocation on that basis.

**The transportation policy does not require revocation of the *November Notice*.**

Sierra has not even argued that the transportation policy of 49 U.S.C. §10101 requires revocation of the *November Notice*. Indeed, the Rail transportation policy supports Respondents.

SAV was created to provide railroad service to MBP. As far as SAV knows, McClellan is satisfied with the service SAV is providing. The *November Notice* was filed so that Respondents could maximize the financial strength of all of the members of the Patriot family of railroads. Respondents did receive tax benefits. With respect to the *November Notice*, the Rail transportation policy encourages rail carriers to earn adequate revenues (49 U.S.C. §10101(3)), to ensure the development and continuation of a sound rail transportation system (49 U.S.C. §10101(4)), to foster sound economic conditions in transportation (49 U.S.C. §10101(5)), and to encourage honest and efficient management of railroads (49 U.S.C. §10101(9)).

The Rail transportation policy is not neutral as to the *November Notice*. Indeed, by making use of tax benefits, the *November Notice* has advanced the above cited goals of the Rail transportation policy. The Rail transportation policy does not require revocation of the *November Notice*.

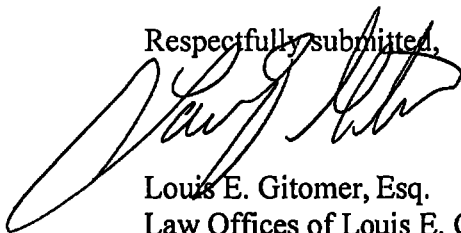
## **CONCLUSION**

Sierra has not demonstrated that the *November Notice* contained false and misleading information. The *November Notice* contained the information required by 49 C.F.R. §1180.4(g). Respondents have carried out the purpose of the *November Notice* by making use of tax benefits and will continue to do so in the future. Indeed, SAV was not the only PRL subsidiary railroad reorganized as a limited liability company from a corporation to make use of certain tax benefits.

SAV was reorganized along with other PRL railroad subsidiaries to make use of certain tax benefits. None of the other subsidiaries are engaged in litigation similar to that between Sierra and PRL. Respondents have not, and do not believe they can use the structure of SAV to prevent a Federal Judge from crafting a remedy if warranted (which it is not) in the future. Sierra has not mentioned, much less demonstrated that the Rail transportation policy requires revocation of the *November Notice*.

Respondents respectfully request the Board to expeditiously deny the Petition.

Respectfully submitted,



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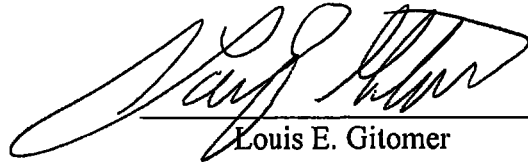
Attorneys for TENNESSEE SOUTHERN  
RAILROAD COMPANY, PATRIOT RAIL, LLC,  
PATRIOT RAIL HOLDINGS LLC, PATRIOT  
RAIL CORP., and SACRAMENTO VALLEY  
RAILROAD LLC

Dated: December 27, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the Response to be served electronically on:

Fritz R. Kahn, P.C.  
1920 N Street, N.W. (8th fl.)  
Washington, DC 20036  
Attorney for Sierra Railroad Company and Sierra Northern Railway

  
\_\_\_\_\_  
Louis E. Gitomer  
December 27, 2011

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TENNESSEE SOUTHERN RAILROAD COMPANY, PATRIOT RAIL, LLC,  
PATRIOT RAIL HOLDINGS LLC, AND PATRIOT RAIL CORP.  
—CORPORATE FAMILY EXEMPTION—  
SACRAMENTO VALLEY RAILROAD, LLC AND PIEDMONT & NORTHERN RAILWAY,  
LLC

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VERIFIED STATEMENT OF BENNETT MARKS

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I am Bennett Marks, the Executive Vice President and Chief Financial Officer of Patriot Rail Corporation. I was in this same position in 2010 when it was determined to reorganize several of the railroad subsidiaries of Patriot from corporations to limited liability companies in order to take advantage of certain tax benefits. The Sacramento Valley Railroad Company was one of the companies reorganized from a corporation into a limited liability company known as Sacramento Valley Railroad, LLC (“SAV”). I note that when Patriot acquired the Weyerhaeuser railroads at about the same time, they were organized by Patriot originally as limited liability companies. See *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Columbia & Cowlitz Railway, LLC, DeQueen and Eastern Railroad, LLC, Golden Triangle Railroad, LLC, Mississippi & Skuna Valley Railroad, LLC, Patriot Woods Railroad, LLC, and Texas, Oklahoma & Eastern Railroad, LLC*, Finance Docket No. 35425 (STB served November 12, 2010). The Piedmont & Northern Railway, Inc. was reorganized into a limited liability company at the same time as SAV. See *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Corporate Family Transaction Exemption—Sacramento Valley Railroad, LLC and Piedmont & Northern Railway, LLC*, Finance Docket No.

35449 (STB served December 8, 2010). In 2011, Patriot changed two entities to limited liability companies - Patriot Rarus Acquisition, LLC and Rarus Railway, LLC.

We determined to reorganize certain, but not all, of our railroads to take advantage of certain tax benefits that were available from the sale of tax credits under a limited liability structure rather than under a corporation structure. SAV was one of the railroads changed to a limited liability company. Making use of tax benefits was the sole purpose for reorganizing these railroads, including SAV. As a result of the reorganization of these railroads, including SAV, Patriot has been able to sell tax credits. The benefit has been to maximize the financial strength of all of the members of the Patriot family of railroads.

### **VERIFICATION**

I, Bennett Marks, declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this 27th day of December 2011.



Bennett Marks